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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. [redacted] 52

JOHN TERRY, ET AL.,

Petitioners,

v.

A. J. ADAMS, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 754

JOHN TERRY, ET AL.,

Petitioners,

v.

A. J. ADAMS, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Come now John Terry, Jessie Byers, R. E. Pink Jr., Charlie Roberts, and Price Jackson, Petitioners, and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on January 11, 1952 (R. 158), and the order denying rehearing entered on February 20, 1952 (R. 166).

Opinions Below

The opinion of the district court granting the Petitioners' right to vote in the primaries (R. 120-131) is reported in 90 Fed. Supp. 595. The opinion of the Court of Appeals (R.

147-158) denying Petitioners the right to vote in the primaries is reported in 193 Fed. (2d) 600.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254 (1). The judgment of the Court of Appeals was entered on January 11, 1952. A petition for rehearing was filed on January 28, 1952, and was denied on February 20, 1952. This Petition is presented May 6, 1952.

Questions Presented

I

Whether Petitioners, members of the Negro race, have a constitutional right to vote in the primary elections of a political party that has no statewide organization, but which nominates for county and precinct offices only.

II

Whether under the Constitution of the United States a political party without statewide organization, but which nominates for county and precinct offices only can deny to citizens of the Negro race the right to vote in its primary elections on the sole ground of race or color.

III

Whether a political party by the device of holding its primary elections in advance of the statutory dates can avoid the holding by this Court in *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, and exclude Negroes from the ballot box.

IV

Whether a political party by the device of violating the statute regulating county wide political parties can attain

an immunity from the restraints of the Fourteenth and Fifteenth Amendments that would be denied it were it to comply with the statutory regulations.

Statutes Involved

The State of Texas has by statute regulated political parties with only county and precinct organization. *Tex. Rev. Civ. Stat.* (1925), Art. 3163. This statute is printed in Appendix A, p. 16, infra.

Petitioners rely in part upon 8 U. S. C. A., 31; this statute is printed in Appendix B, p. 16, infra.

Statement of the Case

Petitioners are members of the Negro Race and are qualified voters (R. 53).

The Jaybird Party of Ft. Bend County, Texas, officially named the Jaybird Democratic Association of Ft. Bend County, Texas, was organized in 1889 (R. 96). Since that date it has nominated for County and Precinct offices only (R. 110). Respondents are officials of this party (R. 36).

Since 1889 the qualified voters of the County, with the exception of Negroes, have participated in its conventions and primaries (R. 65-66; 106).

Since 1889 the nominees of this party have been the only names placed on the Democratic Primary ballots for county offices (R. 68-69, 110).

Since 1889 the nominees of this party have been the only names on the general election ballot for county offices (R. 88, 110).

Since 1889, the nominees of this party for county offices have been elected to such offices (R. 68-69, 88, 110-111).

The purpose of the organization, as stated by Mr. A. J. Adams, its president, and Mr. R. M. Darst, an executive committeeman, is to elect the choice of the Association to

public office and have them run the government of the county (R. 67, 91).

All white males and females of Ft. Bend County, Texas, who are qualified voters under the laws of the State of Texas and who have paid, or are exempt from paying, the poll tax are automatically members of the Association (R. 39, 65, 91, 106). The voting list of the county, with the exception of negroes, comprises the membership of the Association (R. 65, 106). When the elections are held the official poll tax lists are used, they being obtained free of charge from the office of the County Clerk (R. 66).

Organization of the Association parallels that of the Democratic Party in the precincts and county (R. 35, 38, 63, 108); by popular vote it chooses precinct judges for the twenty-two voting precincts of the county, who comprise the County Executive Committee (R. 35-36, 63, 108).

Elections of the Association are called "primaries", a first primary and a run-off primary (R. 38). Candidates desiring to run for county or precinct offices make application to the Executive Committee and pay a filing fee set by the Executive Committee which amounts to between 2% and 3% of the salary paid for the offices to which the candidates aspire (R. 36-37).

Candidates in the primaries conduct public campaigns for nomination, putting up posters, announcing that they are running for public office, distributing campaign literature, and publicizing themselves in newspapers of the county (R. 70-73).

Voting in the primaries is by printed ballots and in the respective voting precincts of the county, paralleling other elections (R. 38, 108). The voting is secret as in any other election (R. 108).

The votes are counted in the precincts and then certified to the Executive Committee, which canvasses the returns and declares the result (R. 40, 108).

On this evidence, the trial court found the Association to be a county-wide political party within the terms of *Tex. Rev. Civ. Stat.*, (1925), Art. 3163 (R. 129).

The Jaybird Primaries are held in May and June of election years in advance of the statutory dates for primaries in July and August (R. 108-109).

As to the purpose of not holding the primaries at the statutory times, Mr. D. R. Pearson, a founder of the Association, testified as follows:

> "Q. And if the law says they (negroes) should vote you want an election held where they cannot vote, don't you?
>
> A. Well, I suppose I might say yes." (R. 109-110).

In a fuller manner Mr. A. J. Adams, President of the Association, testified to the same facts as follows:

> "Q. *And then one of the purposes of your organization is for the specific purpose of excluding negroes from voting, isn't it?*
>
> A. *Yes.*
>
> Q. *And that is your policy?*
>
> A. *Yes.*
>
> Q. *I will ask you, that is the reason you hold your election in May rather than in June or July, isn't it?*
>
> A. *Yes.*" (R. 85).

As to the object and purpose of the Association, the trial court made the following clear and explicit finding:

> "It is perfectly plain that the main and primary object of such Association has been from the beginning of its organization and still is to aid and enable the white voters of Fort Bend County to select and elect the County and Precinct officers of Fort Bend County and to deny the negro any voice or part therein." (R. 126).

On the above facts and fact findings the trial court entered judgment giving Petitioners the constitutional

right to vote in the Jaybird Primaries (R. 131-135). The Court of Appeals did not overturn the findings of fact but held that the law applicable to the facts authorized the exclusion of the Petitioners from the primaries on the sole ground of race or color (R. 151).

Specification of Errors to Be Urged

It is urged that the Honorable Court of Appeals erred in the following particulars:

I

In holding that the Petitioners can be excluded from the Jaybird Primaries on the sole ground of race or color.

II

In holding that the Jaybird Primaries are not state action.

III

In failing to hold that the rule of *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, entitles the Petitioners to vote in the Jaybird Primaries.

IV

In holding that the Fourteenth and Fifteenth Amendments to the Constitution of the United States do not guarantee to Petitioners the right to vote in the Jaybird Primaries.

V

In holding that the Jaybird Party can avoid the mandates of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and the rule of *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, by the device of holding its primaries a few days in advance of the dates set by the state statute.

VI

In holding in direct conflict with the decisions by the Court of Appeals for the Fourth Circuit in *Rice* v. *Elmore* (4th Cir.) 65 Fed. (2d) 387 (Cert. Den.), and *Baskin* v. *Brown*, (4th Cir.) 174 Fed. (2d) 391.

Argument and Authorities Supporting the Granting of the Writ

I

This Petition presents for consideration another device for excluding members of the Negro race from the ballot box. It functions as follows:

(1) Hold a public primary election and run-off primary election a few weeks in advance of the statutory dates for primaries.

(2) Have the only contest that really counts in these advance primaries.

(3) Exclude Negroes from voting in these advance primaries.

(4) Put the nominees of these advance primaries on the ballots in the Democratic Primaries *without opposition.*

(5) Put the same nominees on the general election ballot *without opposition.*

Thus the Jaybird Primaries predetermine and effectively control the choice in the Democratic Primaries and in the general election. Thus Negroes are denied a voice in the only election that counts. Thus Negroes are denied a voice in the government of their county. This device is but a means of circumventing the rule of *Smith* v. *Allwright*, 321 U. S. 648, 64 S. Ct. 757 and the mandates of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The record demonstrates almost conclusively that the Jaybird Party is in actual fact the local Democratic Party. We respectfully advance the suggestion that the Court of Appeals has failed to give sufficient weight to the abundant evidence with which the record is replete on this point: For sixty years the local Democratic organization has submitted to the decisions and desires of the Jaybird Association, for it has accepted the latter's choice without contest, thereby sanctioning and participating in the discrimination practiced. Under most all rules of evidence a sixty-year course of acquiescence would mean agreement to, cooperation with, and participation in the activity.

This sixty-year submission in a heretofore ardently Democratic state identifies the Jaybird Association as the local Democratic Party organization. Where else in this state for the past sixty years has this turbulent party been so supine? Its local conspicuous quiescence is not only suspicious, it supports and compels the conclusion that it is, by the device of the Jaybird Primary, practicing discrimination forbidden by the Constitution and this Court.

We strongly urge upon this Court the significance of the decision by the Court of Appeals, and the import of legal sanction of the Jaybird Primary as setting a pattern for further and more extensive disenfranchisement of Negro citizens.

Every conceivable device, including this one, has been used in an effort to circumvent the Constitution and to deny to the Negro race an effective voice in elections. See: *Guinn* v. *United States*, 238 U. S. 347, 35 S. Ct. 926 (The "grandfather clause"); *Nixon* v. *Herndon*, 273 U. S. 536, 47 S. Ct. 446 (Statutory exclusion of Negroes from primaries); *Nixon* v. *Condon*, 286 U. S. 73, 52 S. Ct. 484 (Delegation of control of party membership to the State Executive Committee of a party); *Lane* v. *Wilson*, 307 U. S. 268,

59 S. Ct. 872 (Complicated registration procedures); *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757 (Delegation of full control of membership to political parties); *Baskin* v. *Brown*, 174 Fed. (2d) 391 (Membership in political party clubs); *Rice* v. *Elmore*, 165 Fed. (2d) 387 (repeal of all statutory regulations); *Davis* v. *Schnell*, 81 Fed. Supp. 872 ("Understanding and explaining" the Constitution—the "Boswell Amendment"); *Perry* v. *Cyphers*, 186 Fed. (2d) 608 (County wide party's primary on same date as state party's primary).

In each and every case the Courts have ultimately held in favor of the right of franchise, but those determined upon discrimination have continuously conceived more subtle and sophisticated modes to accomplish a purpose inconsistent with democratic tenets and at odds with the growth of the concept of government by the consent of the governed.

Can it be doubted that the device of the Jaybird Primary will be seized upon in other communities and states to avoid *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757? If such procedures are valid on a county level, they are legal on a state level, for the same principles apply, with the result that the door is opened for circumvention of *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757.

II

We urge that the Court of Appeals failed to give full effect to the Trial Court's fact finding that the Jaybird Association is a political party. Such finding is binding on appeal, unless obviously wrong. *United States* v. *United States Gypsum*, 333 U. S. 364, 68 S. Ct. 525. *Federal Rule of Civil Procedure No. 52(a)*.

That finding of fact is amply supported by the evidence, which is reviewed under the Statement of the Case at

pages 5 and 6, *supra*. That finding has not been set aside by the Court of Appeals.

The Texas statutes regulate political parties with only County-wide organization, so if the Jaybird Association is in fact such a political party, it is subject to the statute, whether it has complied with it or not. The fact finding that it is a political party with only County organization places the Jaybird Association within the provisions of the statute. Statutory control is determined not by the desires of the party involved, but by the existence or non-existence of a certain factual picture. The Trial Court concluded that fact issue against the Jaybirds.

Consider the anomaly presented by the decision in this case and *Perry* v. *Cyphers*, 186 Fed. (2d) 608. In both we find county-wide political parties. The Citizens' Party of *Perry* v. *Cyphers, supra,* holds its primaries on the statutory date, and must therefore submit to the prohibitions of the Constitution; the Jaybird Association, also a county-wide political party, has violated the statute, with the result that it is immune from Constitutional restraint. It necessarily follows that the Citizens' Party can attain such immunity and avoid the effect of *Perry* v. *Cyphers, supra,* by following in the tracks of the Jaybirds and refusing to comply with the law.

Until and unless it can be said that the Trial Court's finding of fact that the Jaybird Association is a political party is obviously wrong, we are confronted with a premium set upon disobedience of law. A county-wide political party obtains immunity from the majesty of the Constitution of the United States by failing and refusing to obey statutory regulations of the State of Texas.

By committing the wrong of noncompliance with statutory procedures, the Jaybird Association is accomplishing the wrong of disenfranchisement. By disobedience the Association attains what would be denied it for obedience.

III

Consider the decision by the Court of Appeals in relation to the holding of the Fourth Circuit in *Rice* v. *Elmore*, 165 Fed. (2d) 387 (Cert. Den.), 333 U. S. 875, 68 S. Ct. 905. There the State of South Carolina had repealed *all* statutes regulating political parties. Nevertheless, the Court moved upon the theory that statutory regulation was not required in order for a political party to be an agency of the state. It concluded that political parties are state agencies by virtue of fact and custom, the presence or absence of statutory regulation not being of controlling significance.

Its conclusion was grounded on *United States* v. *Classic*, 313 U. S. 299, 61 S. Ct. 1031, which announced that "*even apart* from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice," the primary was state action because it predetermined the choice at the general election. The same doctrine was announced in *Newberry* v. *United States*, 256 U. S. 263, 285-287, 41 S. Ct. 476, 484: "As a practical matter, the ultimate choice of the mass of the voters is predetermined when the nominations have been made."

The record of the present cause is conclusive to the effect that the Jaybird Primary has predetermined the choice since 1889.

When *Rice* v. *Elmore, supra,* with no statutory regulation whatsoever, is compared with the cause before us, in which the state has enacted statutory regulations, which are disobeyed, a stronger cause for the constitutional injunction is here presented. Had we no statutory regulation here, *Rice* v. *Elmore, supra,* would be directly in point. Can it be possible that the attempted regulation has weakened our position?

IV

The Court of Appeals treated the Jaybird Party as a mere private organization unfettered by the Constitutional restraints. However, political parties are today considered agencies of the state, and as such are held subject to the Constitutional mandates. *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757.

After the decision of *Smith* v. *Allwright, supra*, the State of South Carolina endeavored to circumvent the ruling by repealing all statutes regulating political parties on the theory that the political party would thus become a private association with the right, as a private association, to exclude negroes from primaries on the grounds of race. With the statutes repealed, the Democratic Party of South Carolina enacted party rules excluding negroes from its primaries.

The constitutionality of this action reached the appellate courts in *Rice* v. *Elmore* (4th Cir.), 165 Fed. (2d) 387 (Cert. Denied, 333 U. S. 875, 68 S. Ct. 905). The party officials contended that the party rules were not prohibited by the Fourteenth Amendment, as the party was a private organization. *Rejecting this contention* the Court said:

> "The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, *political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people.* . . .
>
> . . . . . .
>
> "It is true, as defendants point out, that the primary involved in Smith v. Allwright was conducted under

the provisions of state law and not merely under party rules, as is the case here, but we do not think this a controlling distinction. *State law relating to the general election gives effect to what is done in the primary and makes it just as much a part of the election machinery of the state by which the people choose their officers as if it were regulated by law, as formerly.* Elections in South Carolina remain a two step process, whether the party primary be accounted a preliminary of the general election, or the general election be regarded as giving effect to what is done in the primary; and those who control the Democratic Party as well as the state government cannot by placing the first of the steps under officials of the party rather than of the state, absolve such officials from the limitations which the Federal Constitution imposes. *When these officials participate in what is a part of the state's election machinery, they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise.* * * *." (Emphasis ours).

This concept is carried forward in *Baskin* v. *Brown* (4th Cir.), 174 Fed. (2d) 391, wherein party officials contended that the party, being unfettered by state statute, was free to exclude Negroes from the primaries; we quote:

> "* * * *When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such discrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids.* * * *."

Such construction of the function of political parties is the one adopted by the Supreme Court, and is the one to be applied in the present cause.

Conclusion and Prayer

On the facts and authorities presented, the reasons for granting the Writ of Certiorari may be summarized as follows:

(1) The State of Texas has by statute recognized the place of the primaries of county-wide parties in the electoral scheme for choice of county officials.

(2) The State of Texas has by statute made the primaries of county-wide political parties an integral part of the procedure of choice of county officials.

(3) The Jaybird Association was found by the trial court on abundant proof to be a county-wide political party.

(4) Since 1889 the Jaybird Primaries have effectively controlled the nominations for county officials in the primaries of the Democratic party.

(5) Since 1889 the Jaybird Primaries have affected profoundly the choice of county officials in the general election.

(6) Since 1889 the Jaybird Primaries have effectively controlled the choice of county officials in the general election.

(7) State law of Texas relating to the general election gives effect to what is done in the Jaybird Primaries.

(8) By engrafting their primaries onto the state election process the Jaybird officials have become elections officers of the state *de facto*, if not *de jure*.

(9) Having established an elective process of the people of the county substantially affecting and effectively controlling the exercise of sovereignty by the people of the county, the Jaybird officials cannot violate the constitutional guaranty of the right of franchise.

(10) That choice of the voters in the Democratic Primaries and the general election has been predetermined by the Jaybird Primaries.

(11) The Jaybird Primaries are so used in connection with the Democratic Primaries and the general

election that the latter merely register and give effect to the unconstitutional discrimination practiced by the former.

(12). The Jaybird Primaries are but a sophisticated device to bring about racial discrimination in violation of the constitutional and statutory guaranty.

WHEREFORE, Petitioners respectfully pray that this Honorable Supreme Court of the United States grant the Writ of Certiorari to correct the error of the Honorable Court of Appeals in denying the Petitioners the right to vote in the only election that controls in their county.

Respectfully submitted,

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APPENDIX "A"

ART. 3163. 3169 PARTIES WITHOUT STATE ORGANIZATION.

Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. Id. sec. 100.—(Tex. Rev. Civ. Sta., (1925).)

APPENDIX "B"

SEC. 31. RACE, COLOR, OR PREVIOUS CONDITION NOT TO AFFECT RIGHT TO VOTE.

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R.S. Sec. 2004.—(8 U. S. C. A.)